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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 154

EDWARD R. DOWNING, RANDOLPH PHILLIPS, *et al.*,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

THE UNITED CORPORATION,
Intervenor,

THE GENERAL PROTECTIVE COMMITTEE FOR HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED CORPORATION IN OPPOSITION

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Dated: July 24, 1953.

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SECURITIES AND EXCHANGE COMMISSION,
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THE GENERAL PROTECTIVE COMMITTEE FOR HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION,
Intervenor.

BRIEF FOR THE UNITED CORPORATION IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 169-194) is reported at 203 F. (2d) 611. The Findings and Opinion of the Se-

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NOTE: For convenience, The United Corporation will sometimes be referred to as "United", the Securities and Exchange Commission as "the Commission" and the Public Utility Holding Company Act of 1935 as "the Act."

curities and Exchange Commission dated June 15, 1951 (R. 2-43), supporting the Commission's Order of June 26, 1951 (R. 45-47), has not yet been officially reported but is set forth in the Commission's Holding Company Act Release No. 10614.

Jurisdiction

The Judgment and Decree of the Court of Appeals for the District of Columbia Circuit was entered on March 31, 1953 (R. 195-196). The petition for a writ of certiorari was filed on June 27, 1953. The jurisdiction of this Court has been invoked under 28 U. S. C. Sec. 1254, made applicable by Section 24(a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. Sec. 79-79z-6).

Statement of the Case

The petition for a writ of certiorari contains so many misrepresentations that it is deemed necessary to present on our part a complete statement of the case.

The United Corporation was organized in 1929 under the laws of the State of Delaware with the general corporate powers of an investment company. United now has about 48,000 stockholders, and its total assets, which consist of cash and portfolio securities, amount to more than $67,000,000.

United registered as a holding company under the Public Utility Holding Company Act on March 28, 1938, the day this Court announced its decision upholding the registration provisions of the Act (*Electric Bond & Share Co., et al.* v. *Securities and Exchange Commission, et al.*, 303 U. S. 419). United was subject to the Act because it owned more than ten per cent (but very substantially less than a majority) of the voting securities of four other companies which were either public utility companies or holding com-

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panies.* However, unlike most registered holding companies, United did not perform any engineering, accounting or other services for these four statutory subsidiaries, nor were United and the subsidiaries operated as a single public utility system. United functions, in fact, as an investment company and it advised the Chairman of the Securities and Exchange Commission as early as 1938 that it proposed to continue to function as such, and, meantime, to divest itself of the voting securities of its four statutory subsidiaries to the extent necessary to attain full compliance with the Act (R. 55-57).

A. *The Basic Order of August 1943*

During 1941 and 1942, extensive hearings with respect to the status of The United Corporation under the Act were held before the Commission over a period of eight months. At the hearings, the Commission's Staff opposed a plan which United had proposed to effect compliance with the Act, and took the position that United should be dissolved. *The petitioners herein took no part whatever in that proceeding,* which was viewed as involving chiefly a dispute between the Commission's Division of Public Utilities and The United Corporation. Representatives of some of the Corporation's Preference stockholders took minor parts.

The opposing views of United and the Staff were ultimately presented in briefs and argument to the full Commission. In particular, United vigorously challenged the authority of the Commission to require dissolution when United had elected the alternative of disposing of its excess holdings of public utility securities and continuing in existence as an investment company in fields outside the scope of the Holding Company Act.

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* The statutory subsidiaries of United at that time were: The United Gas Improvement Company, Columbia Gas & Electric Corporation, Public Service Corporation of New Jersey and Niagara Hudson Power Corporation.

After the proceedings had terminated, consultations were had between representatives of United and members of the Commission with respect to the form of order to be issued in this basic proceeding (R. 95-96). While petitioners have attempted to spell out some impropriety in these conferences in 1943, the plain fact is that they constituted a wholly proper attempt by the Commission to settle the controversy between its own Staff and the Corporation without further litigation. Moreover, although petitioner Phillips has previously made the same charge in this Court, (*Phillips* v. *Securities and Exchange Commission, et al.*, 153 F. (2d) 27, certiorari denied 328 U. S. 860), and in lower Courts to which he has carried his long fight against United's management, no Court has sustained him.

On August 14, 1943, the Commission rendered its decision. *Matter of The United Corporation,* 13 S. E. C. 854. While stating, "In general we recognize the possibility that a holding company may comply with the statute by transforming itself to an investment company," (13 S. E. C. at 885), the Commission disapproved the particular plan United had proposed. On the other hand, the Commission concluded that, if United were able to find a solution to the complex problems involved in meeting the standards of the Act, it would be wholly appropriate for United to transform itself into a registered investment company. In this connection, the Commission stated, in part (13 S. E. C. at 899):

> "* * * The problem remains as to the appropriate remedy under Section 11(b)(2) to ensure the correction of this situation. It seems clear that dissoultion would be appropriate in this case. However, the management of United has stated many times that it is desirous of entering into the business of an investment company. While, as we have seen, no substantial progress has been made in this direction, we are nevertheless not prepared to say that it is not a possible solution to the problems of this company under the Act. The approach which United has adopted in its plan is, as we have indicated, not one which carries much hope that such

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> a solution will be effected. *Nevertheless, all the problems which we have raised will be effectively dealt with should United actually succeed in ceasing to be a holding company.* Under all the circumstances of this case we have determined that we will withhold the issuance of a dissolution order and will require only that United correct the inequitable distribution of voting power within its own company by recapitalizing with a single class of stock and that it shall cease to be a holding company." (Italics supplied.)

The Commission's conclusion was embodied in a formal Order (R. 167-168) which required that United:

(a) Change its existing capitalization of Preference and Common Stock to a single class of Common Stock, and

(b) Cease to be a holding company, i.e., reduce its holdings in its four statutory subsidiaries to a level compatible with the objectives of the Act.

Neither the petitioners herein nor any other person sought judicial review of the Commission's Order or challenged the Commission's authority thus to direct a course of compliance designed to protect the interests of United's stockholders. Indeed, although petitioners are at this late date seeking to cast doubt upon the validity of the Commission's decision, petitioner Phillips has on several occasions expressed his complete approval of the 1943 Order. As early as 1943 Phillips informed United stockholders that he was "opposed" to the dissolution of the Company (R. 72). He emphasized to this Court in 1946 that he had never had any "complaint" with the Order. (Page 7 of Petition in *Phillips* v. *Securities and Exchange Commission, et al.,* 153 F. (2d) 27, certiorari denied 328 U. S. 860.) Furthermore, in this proceding Mr. Phillips himself submitted a proposal for the continued existence of United as a registered investment company (R. 31-34). His proposal was based on the premise that United's dissolution is not required by the Act and he so stated to the Commission. The present attack upon the 1943 Order follows the rejection of the Phillips proposal.

B. *United's Successful Program for Compliance with the Order of August 1943*

The Order of August 1943 set the pattern for United's compliance with the Act. Once its status had been clarified by the Order, United proceeded with a highly successful program for accomplishing the directives of the Order, the details of which (pages 100-122 of the Record herein) disclose the magnitude and complexity of the problems which were involved.

Under that program, the entire issue of United's Preference Stock (2,488,712 shares) which had a liquidating claim, including accrued dividends, of more than $136,000,000 at the end of 1943, has been retired, and accumulated dividends on the stock paid.* United has also divested itself of securities of its former statutory subsidiaries (with a value of more than $175,000,000 on the basis of recently indicated market values) to the extent that its largest percentage holding of voting securities in any company (Niagara Mohawk Power Corporation) is not more than 7.42. Sales of the stock of that company were stayed pending the decision of the Court of Appeals in this case. With that stay lifted, sales were resumed and will continue until the Company's holdings are reduced to the 4.9 per cent level. United does not now own as much as 4.9 per cent of the voting securities of any other company.

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* Under three separate plans for exchanging the Preference Stock for cash and portfolio securities, the Preference stockholders received "packages" the market values of which have frequently been in excess of the liquidating claim of the stock at the time the exchange was made. (*Matter of The United Corporation*, 17 S. E. C. 404 (1944); *Matter of The United Corporation*, 19 S. E. C. 190 (1945); *Matter of The United Corporation*, ——— S. E. C. ———, Holding Company Act Release No. 8409 (1948).) Phillips opposed each of these plans, but in no case on the ground that the 1943 Order should be rescinded or that United should be dissolved.

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At the end of 1943, when the initial steps of compliance were being formulated, United's Common Stock, on the basis of the then indicated market value of the Company's assets, was "under water" to the extent of more than $15,000,000, or approximately $1.09 per share, by virtue of the senior claim of the Preference Stock (R. 117-118). *Despite the extensive divestment program since that time and after the distribution to Common stockholders in 1949 of shares of the stock of a former statutory subsidiary with a value of $28,419,000 at current prices, United still retained, as of June 30, 1953, assets with a net indicated market value of $67,582,000, or $4.80 per share.*

This remarkable record of accomplishment under a regulatory statute of unprecedented scope received judicial commendation in an earlier proceeding, when the Court of Appeals for the District of Columbia Circuit observed (per Washington, J.):

> "* * * Progress of this sort is not lightly to be undone * * *." (*Phillips* v. *Securities and Exchange Commission, et al.*, 185 F. (2d) 746, 750 (1950).)

C. *The Commission's Approval of the Residual Steps for Transformation of United into a Registered Investment Company*

In November 1949, after all of its Preference Stock had been retired and the program for compliance substantially completed, United sought Commission approval for a plan to complete its transformation into a registered investment company. This plan represented the "clean up" phases of the program which had been in operation more than six years. Nevertheless, by virtue of the participation of petitioner Phillips, who was actively pressing for Commission approval of his own proposals for the future operation of United as a registered investment company, extensive hearings were held and a record made which comprised

4,595 pages, exclusive of voluminous exhibits, matter incorporated by reference and other documents.

As finally amended to meet the requirements of the Commission and the Staff, United's plan provided for:

(a) *An opportunity for any stockholder desiring to do so to withdraw from the enterprise.* At the hearings, the Commission's Staff took the position that it could not recommend approval for United's transformation into a registered investment company unless stockholders were permitted to withdraw their pro rata shares of the Company's assets or the equivalent thereof (R. 138-149; 153-154). United accepted this condition, and this part of the plan was carried out in July, 1951 without objection from the petitioners. United exchanged, with stockholders who elected to leave the enterprise, shares of Niagara Mohawk Common Stock and cash, for United Common Stock. Still pressing for the adoption of his own views on the future management of the Company, Phillips chose not to exchange the shares of United Common he claims to own, despite the highly favorable basis for exchange as compared with what could have been realized through liquidation of the Company.

(b) *The reduction of United's holdings of voting securities of statutory subsidiaries to no more than 4.9 per cent.* While United had originally proposed that its holdings of voting securities of its statutory subsidiaries in excess of the 5 per cent level be escrowed pending their orderly divestment over a period of five years, United acquiesced in the request of the Commission's Staff (R. 154) that the plan be amended so as to provide for a reduction in United's holdings below the 5 per cent level within a period of one year.

(c) *Changes in United's charter and by-laws with respect to the procedure at stockholders' meetings.* The Staff also requested that United amend its plan so as to

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provide for cumulative voting in the election of directors and for a fifty per cent quorum at stockholders' meetings. These modifications were also accepted by United.

(d) *Cancellation of the outstanding warrants to purchase United Common Stock.* United had originally proposed that the existing Option Warrants to purchase Common Stock be exchanged for new warrants with different terms. However, after the Staff had made clear its opposition to the issuance of new warrants of any description, United amended its plan to provide for cancellation of the warrants.

The Commission's Findings and Opinion approved United's amended Plan, subject to certain other minor modifications (R. 1-43), and rejected the Phillips investment company proposal. After the required modifications had been made, the Commission entered an Order on June 26, 1951 (R. 44-47) finally approving the Plan.

The provisions in the Plan for the changes in United's charter and by-laws with respect to stockholders' meetings were not contested by petitioners, and await only the termination of this litigation to become effective through an enforcement order of an appropriate United States District Court. Moreover, it is reasonable to expect that, in the very near future, United will have reduced to 4.9 per cent its holdings in the single company in which its ownership now exceeds that level. When these final steps have been taken, United proposes to apply to the Commission for an Order pursuant to Section 5(d) of the Act declaring that it has ceased to be a holding company, and, thereupon, to register as an investment company under the Investment Company Act of 1940 (15 U. S. C. § 80a).

The Scurrilous and Unfounded Charges against the Commission and the Company

As noted earlier, Phillips was suggesting in this Court and lower Courts as far back as 1946 that United was receiving unduly favorable treatment from the Commission. More recently, he has been openly charging connivance between the Commission and United. On January 14, 1952, Phillips testified before the Securities and Exchange Commission Subcommittee to the Committee on Interstate and Foreign Commerce of the House of Representatives, which had undertaken an over-all study of the work of the Securities and Exchange Commission. The Final Report of the Subcommittee, submitted to the Chairman of the Committee on Interstate and Foreign Commerce on December 5, 1952, stated unequivocally (p. 37) that Phillips had not presented "any credible evidence" to support his charges of improper influence.

The Petition, in a scurrilous and reprehensible manner, attacks the integrity of John J. Burns, director and counsel to United, and others associated with United's management. The quotations from the Congressional Record attributed to Senator Douglas (Petition, footnote, p. 58) have been lifted piece-meal from a lengthy colloquy in the Senate in which Senator Douglas and several other Senators participated. Judge Burns was mentioned in that colloquy only for the fact that, having resigned as Chief Counsel of the Commission, his private practice thereafter included matters before the Commission. Neither Senator Douglas nor any other Senator even intimated that Judge Burns had ever engaged in the "purchase and sale of influence." Finally, and even more important, the footnote wholly omits to state that, after having heard Phillips' charges and having examined "leads" supplied by him, the Subcommittee of the House Committee on Interstate and Foreign Commerce, which had been given specific responsibility for examination of the work

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of the Commission, *issued its Final Report many months after the colloquy in question* and held that no "credible evidence" had been produced to support the charges.*

Also highly improper is the twisted reference (pp. 58-59 of Petition) to an *incomplete* examination before trial of counsel for United in another action brought by Phillips, *but wholly unrelated to this proceeding.* United's counsel had been specifically directed by United's Board to assert the Company's privilege against the disclosure of any confidential communication in that case. It is clear that, under these circumstances, counsel not only had the right to invoke privilege but, indeed, a very serious duty to do so.** (*Phillips* v. *Hickey, et al,* U. S. D. C., S. D. N. Y., Civil Action No. 51-259, opinion by Conger, D. J., dated March 13, 1950; see also *Hunt* v. *Blackburn,* 128 U. S. 464 (1888); 5 Wigmore, Evidence (2d. Edition), § 2324).

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* At the time the settlement of United's program for Section 11 compliance was made with the Commission in 1943, Judge Burns had been in private practice for *more than six years.* Mr. Hickey had not been connected with the Commission for *more than seven years* (R. 101-102).

** Equally without merit is Phillips' claim to represent "22,081 stockholders" in this proceeding. The proxies upon which the claimed representation is based were obtained more than six years ago at a stockholders' meeting, or *more than two years before the Final Plan now under review had even been filed and more than four years before that plan, with all of the modifications required by the Commission and its Staff, received Commission approval.* There is nothing in the record which indicates that any of the stockholders who gave Phillips their proxies back in 1947 would give him a proxy today, or that he now represents anyone other than himself. On the other hand, the Commission's official files show (Form U5S Annual Report of The United Corporation for 1952, verified April 29, 1953 (File No. 30-116)) that at the most recent meeting of stockholders United's Board of Directors was reelected by the affirmative votes of the holders of 89.6 per cent of the 14,072,149 shares outstanding, an almost unprecedented record for a company with such widely distributed stock.

The Contradictory Claims of the Petitioners*

The hodge-podge of argument in the Petition reflects, we submit, the anomaly of the petitioners' case.

They come to this Court only as Common stockholders of the Company. They represent no other interest; neither the erstwhile Preference stockholders; nor creditors (of whom the Company has had none of substance in many years); nor the custodians of the public interest. If they are aggrieved it must be in their interest as the claimed owners of shares of the Common Stock.

But, if one thing is crystal clear it is that the basic Order of 1943 and the ensuing steps of compliance have been highly beneficial to the Common stockholders. (See page 7, *ante*.)

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* Petitioners Phillips and Downing have been engaged in almost continuous, but wholly unsuccessful, litigation and proxy contests against the management of United since 1943. Phillips has opposed virtually every step taken by United in its program for compliance. So notorious had his activities become as early as 1948 that the Court of Appeals for the Second Circuit observed that it was an "obvious fact" that his litigation had contributed to any delay in United's program for compliance. *Phillips* v. *Securities and Exchange Commission, et al., Phillips* v. *The United Corporation, et al.*, 171 F. (2d) 180, 183.

See Phillips v. *Securities and Exchange Commission, et al.*, 153 F. (2d) 27 (2d Cir. 1946), certiorari denied 328 U. S. 860; *Phillips* v. *Securities and Exchange Commission, et al.*, No. 20,051 (2d Cir. 1946); *Downing* v. *Howard, et al.*, 68 F. Supp. 6 (Del. 1946), 162 F. (2d) 654 (1947), certiorari denied 332 U. S. 818; *Phillips* v. *Securities and Exchange Commission, et al., Phillips* v. *The United Corporation, et al.*, 171 F. (2d) 180 (2d Cir. 1948); *Matter of The United Corporation*, 82 F. Supp. 196 (Del., 1949), Appeal No. 10,059 (3d Cir.); *Phillips* v. *Securities and Exchange Commission, et al.*, 185 F. (2d) 746 (D. C. Cir. 1950); *Phillips* v. *Securities and Exchange Commission, et al.*, 10,601 (D. C. Cir. 1951); *Committee for Common Stockholders of The United Corporation* v. *Securities and Exchange Commission, et al.*, 188 F. (2d) 897 (2d Cir. 1951); *Downing, Phillips, et al.* v. *Securities and Exchange Commission*, No. 11,478 (D. C. Cir. 1952).

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The petitioners concede this when they admit that the dissolution of The United Corporation in 1943 would not have been to the benefit of the stockholders and when they explain that they did not come out for dissolution at all until "United's stocks did recover to an above water position." (Petition, p. 62.)

Why, then, do the petitioners protest that the settlement conferences between the Commission and United's management were not "discovered" until after the time to appeal from the 1943 Order had expired? (Petition, p. 66.) If, as the petitioner Phillips stated to this Court in an earlier petition, he "*at no time has complained of this [August, 1943] Order*" (See page 7 of Petition in *Phillips* v. *Securities and Exchange Commission,* 328 U. S. 860), what possible disadvantage could lack of knowledge of the settlement conferences in 1943 have caused him or any other Common stockholder? There is no claim that the settlement conferences did anything more than bring about the compromise embodied in the 1943 Order, which, as the Court of Appeals found, is "fair on its face and is not, we think, basically unsound. * * *" (R. 175).

But there is a much more serious discrepancy in the petitioners' case. *The plain fact of this record is that Phillips knew about the settlement many weeks in advance of the issuance of the 1943 Order and acquiesced in it, and continued to do so until his own proposal for operating United as an investment company was rejected by the Commission eight years later.*

At page 98 of the Record, Phillips states in his application to be admitted as a party to the proceeding:

> "The effect of Hickey's pre-decision private conversations with members of the Commission with respect to the August 14, 1943 order was to obtain, if he is to be believed, 'an order * * * we could

> work under', that is, an order withholding dissolution of The United Corporation and making possible its transformation into an investment company. *Furthermore, Hickey informed your applicant herein at a luncheon in 1943 that by virtue of his connections with Commissioner O'Brien and Commissioner Healy he had in effect reached an understanding with the Commission whereby The United Corporation would not be dissolved and in return the Hickey management would accept without further litigation an order requiring it to eliminate the Preference Stock and to terminate its holding company status.''*

The luncheon was in the presence of a third person, and took place many weeks prior to August 14, 1943.*

The Petitioners Conceded before the Commission that Dissolution is not Mandatory.

The position petitioners are taking in this Court on the issue of dissolution is not the position they urged upon the Commission. Before the Commission, petitioners argued that transformation of United into an investment company would be entirely appropriate *provided* the Commission would require United to adopt the Phillips proposals (which called for, among other things, a ''diversified'' investment policy, the underwriting by United of petitioners' future proxy contests with the management and the ''removal'' of United's President and counsel) (R. 31-34). Phillips, who had earlier testified in support of his proposals, stated unequivocally to the Commission that

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* This admission should be compared with the statements in the Petition (p. 66) that Mr. Hickey's settlement conferences were not discovered by any of the petitioners until more than 60 days after the 1943 Order was issued and that Mr. Hickey did not disclose those conferences until April 1944.

We do not undertake to correct all of the misrepresentations or to answer all of the charges in the discursive argument of the Petition, because most of the argument is clearly irrelevant.

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the matter of dissolution of a holding company rests in the administrative discretion of the Commission.*

Moreover, the petitioner Phillips has asked in this very proceeding (R. 191) to be reimbursed for "services" and expenses he claims to have rendered in furtherance of the Orders and the course of action he now claims to be illegal under the Act. It is well settled that one cannot claim the benefit of a statute or regulation and afterwards successfully assert its invalidity (*Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 412). See also *Gray* v. *Com-*

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* "* * * This is record evidence that we think you have to consider because whether you choose to dissolve or not dissolve is an active [sic.] administrative discretion. Administrative discretion has to be based on evidence. Neither the staff nor the management has cited you one fact of record, one scrap of evidence, upon which you can base an exercise of administrative discretion.

"We have suggested to you, however, that if the character of the corporation were essentially reformed so as to preclude a repetition of these practices in the non-public utility field, that you have condemned and that Congress has condemned in the public utility field, then you might have a basis for administrative discretion.

"We have said that one of these is open-ending a closed-end company, and another is diversifying a non-diversified. * * *

* * *

"* * * I might add, going back a second, in addition to open-ending the closed-end company and diversifying a non-diversified company, we also think that representation is almost required because you have found in your Dayton Power and Light proceedings on this management, and in your 1943 opinions in this case, that it was through control of the proxy machinery that the management perpetuated itself.

* * *

"*We think these proceedings would give you some basis upon which to exercise administrative discretion against dissolution of this abnormally bad management, this not disinterested management.*" (Pages 83-86 of stenographic minutes of Phillips' oral argument before the Commission on December 20, 1950.) (Italics supplied.)

modity Credit Corporation, 63 F. Supp. 386; *U. S.* v. *San Francisco,* 310 U. S. 16; *United Gas Co.* v. *R. R. Comm'n.,* 278 U. S. 300.

Questions Presented

1. Is it within the discretion of the Securities and Exchange Commission under the Public Utility Holding Company Act, to permit a registered holding company to comply with Section 11 of that Act by transforming itself into an investment company, to be registered thereafter under the Investment Company Act of 1940?

2. Was the Commission required by the Act to order the dissolution of The United Corporation?

3. Did the Commission abuse its discretion in approving United's plan for compliance with Section 11 of the Act?

Summary of Argument

I. The Court of Appeals correctly decided that it is within the discretion of the Commission to permit a public utility holding company to cease to be such by becoming an investment company, and that the Commission is not required by the statute to order the dissolution of The United Corporation.

This decision, based upon the prior decision of this Court in *American Power & Light Co.* v. *Securities and Exchange Commission,* 329 U. S. 90 (1946), is supported by the unambiguous purpose of the Congress in enacting the statute. The legislative history of the Act establishes that the proponents of the legislation concurred in the view that, even under the most drastic version of the proposed statute, a holding company, including one in the so-called "great-grandfather" class, could be permitted to continue to func-

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tion as an investment company. The *purpose* of the Act was to eliminate control over the public utility industry by holding companies; but the *method* by which this purpose was to be accomplished was to be determined by the Commission. Dissolution of public utility holding companies was deliberately not made mandatory.

II. This administrative flexibility under the Act has been recognized and sustained by all courts called upon to consider the question. There is no conflict in the decisions.

III. The Court of Appeals correctly decided that there had been no abuse of discretion on the part of the Commission in this case. The petitioners' claims to the contrary are without substance and have no support in the record.

POINT I

The Court of Appeals correctly decided that dissolution of The United Corporation is not required by the Act.

The Holding Company Act in express language gives the Commission the authority to determine what steps shall be taken by a holding company to meet the requirements of Section 11. The Act, by its terms, does not prohibit a holding company, after it shall have ceased to be such, from transferring its investments to fields outside the scope of the Act. Congress specifically envisaged that a holding company, such as The United Corporation, might transform itself into an investment company. Indeed, it is most probable that the Act, which was passed by the narrowest of margins after extended controversy as to the extent of the power proposed to be granted to the Commission under Section 11, would have been overwhelmingly defeated if Congress had not been assured of this flexibility in its application. This legislative history negatives any

possible implication that the dissolution of a holding company was made mandatory.

Steps Leading to the Adoption by the House and Senate of a Compromise Bill

Early in 1935, bills were introduced into the House of Representatives (H. R. 5423) and into the Senate (S. 1725) looking to Federal regulation of the utility industry. Thomas G. Corcoran, counsel to the President's group which had drafted the original bills, stated, in part, at the hearings on S. 1725:

> "The President particularly recognized in his message the possibility of a holding company becoming an investment trust without injury to an investor. * * *" (Senate Hearings, p. 210.)

Senator Burton K. Wheeler, Chairman of the Committee on Interstate Commerce, expressed the policy of S. 1725 on this point, during a colloquy with a witness at the hearings, as follows:

> "But, as I say, one of these holding companies as a matter of fact could keep its stocks and could keep its bonds and become transformed into a purely investment company, but divorce itself of any actual control over operating companies." (Senate Hearings, p. 496.)

In due course, the Senate Committee reported a substitute bill (S. 2796). Probably the most controversial portion of that bill was the requirement (Section 11(b)(3)) that, promptly after January 1, 1940, *every* registered holding company (with a single exception not here pertinent) "take such steps (either by divesting itself of control, securities, or other assets, or by reorganization or dissolution, or otherwise) as the Commission finds necessary or appropriate to make such company cease to be a holding company * * *."

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The "purposes and effect" of the Section 11 proposed by S. 2796 were described in the Committee Report, as follows:

> "(1) The 'elimination' provided for in section 11, is simply a requirement that within 5 years (with certain permissible extensions) the presently existing public-utility holding companies must choose either——
>
> "(a) To turn themselves into investment trusts by making legal arrangements which will deprive them of the control of the management of operating electric and gas companies in which they have investments, or
>
> "(b) To rearrange or reduce their holdings in operating companies, if necessary, so that each holding company will control the management of only a single system of operating companies, which single system is not mixed up with any extraneous businesses such as real estate, hotels, and operations in foreign countries, and is either (x) predominantly intrastate, or (y) geographically and economically integrated in contiguous States, the laws of which will not permit merger into a single operating system." (Sen. Rep. No. 621, 74th Cong., 1st Sess. (1935), p. 11.)

During the extended debates on S. 2796, Senator Wheeler emphasized to his colleagues that Section 11 would permit holding companies to transform themselves into investment trusts. In this connection, he stated:

> "* * * The holding companies which will have to be eliminated are a comparatively small number. *Under the terms of the bill they can become investment trusts;* they can comply with the standards set up in the bill and establish themselves as regional integrated systems. They can do many other things. * * *" (79 Cong. Rec. 8387, 8388.) (Italics supplied.)

S. 2796 was referred to the House Committee. Despite the assurances that the proposed Section 11 of S. 2796 would authorize holding companies to become investment

companies, the House Committee prepared its own, far less stringent draft. Under this House draft, Section 11 was

> "* * * modified so that the only remaining provision providing for simplification or elimination makes it the duty of the Commission to require each holding-company system to confine its operations to one integrated public-utility system, with the exception that if the Commission finds that such a limitation is not necessary in the public interest, it is to require the limitation of the operations of the holding-company system to such number of integrated public-utility systems as it finds may be included in the holding-company system consistently with the public interest. * * *" (H. R. Rep. No. 1318, 74th Cong., 1st Sess. (1935), p. 17.)

Thus, the Commission's power to compel action with respect to divestment would have been drastically reduced from that under the Senate version of Section 11, and applied only to a holding company that operated more than one integrated public utility system.

In an unsuccessful plea for retention of S. 2796, Congressman Edward C. Eicher (later Chairman of the Securities and Exchange Commission and still later United States District Judge) emphasized to the House that the Senate bill provided ample opportunity for any holding company to become an investment company, stating:

> "As a matter of fact, the Senate bill makes it possible for any giant holding company to maintain intact its existing corporate structure, however intricate and confusing, and to retain intact the ownership of all of its assets, however heterogeneous and geographically diverse, upon one condition. That condition is that it satisfies the Securities and Exchange Commission that it has ceased to be a holding company within the meaning of the bill, i.e., that it has ceased to exercise any controlling influence over the management and policies of any electric or gas operating company and *has become simply a passive investment company, holding its assets and the income therefrom for the benefit of its security holders.*

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> Here certainly is a 'grandfather's clause' fully protecting all ancient equities which the giant holding companies have acquired for their indispensable widows and orphans." (Additional Views by Edward C. Eicher, H. R. Rep. No. 1318, p. 50.) (Italics supplied.)

The Compromise Bill

After conference, the provision of the original S. 2796 requiring that every holding company take action looking to a termination of the holding company relationship was deleted. As finally passed by Congress, the Act requires (so far as is here pertinent) only that each holding company "*take such action as the Commission shall find necessary* in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company." (Italics supplied.) That is, that "great-grandfather" companies take such action as the Commission may deem appropriate to conclude their holding company relationships.

The word "dissolution" does not appear in the Act. On the contrary, nothing more is required by the Act than that "holding companies cease to be holding companies beyond the second degree" (H. R. Rep. No. 1903, 74th Cong., 1st Sess. (1935), p. 70).

The Petition is Based Upon an Erroneous Construction of Section 11

Petitioners' contention that the Act makes dissolution mandatory for every "great-grandfather" company is clearly contrary to the Congressional purpose. If Congress had intended that every "great-grandfather" company be dissolved, it is only reasonable to expect that the word "dissolve", or an appropriate synonym therefor, would have been used in the Act. Instead, the Act provides only that the Commission take such action with respect to a great-grandfather company as may be necessary in order that such a company "shall cease to be a hold-

ing company with respect to" its subsidiary companies. Clearly, the Congressional objective, with respect to a "great-grandfather" company, was only a termination of the holding company relationship. Provided such a company terminates that relationship, whether by dissolution or less drastic means, the Congressional objective is attained. In the present case, the purpose of Congress has been achieved through reorganizations of United's former statutory subsidiaries, in separate proceedings before the Commission. *So that, in fact United no longer is a "great-grandfather" company.*

Moreover, petitioners' construction of Section 11 supposes that the House, despite its insistence upon a far less stringent Section 11 than that proposed by S. 2796, suddenly, *and without any recorded expression whatever of its reason for so doing,* completely reversed its own firm resolve to vote against the proposed legislation unless provisions were included which would permit a holding company, in a proper case, to transform itself into an investment company.*

Finally, all doubt on the question is dispelled by the language of the Act which, in so many words, provides that a great-grandfather company shall *"take such action as the Commission shall find necessary"* to cease to be a holding company. The purpose of the Act in this respect was properly summarized by the Court of Appeals as follows (R. 188):

> "It is certainly true that dissolution of a holding company is contemplated by § 11(b)(2) as a *possible* remedy, but it is equally true that the Act gives the Commission discretion to determine the steps

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* The remarks of Congressman Huddleston (Petition, pp. 23-24), a vigorous opponent of the Act, are not authority for the construction petitioners are seeking. His comments were followed by the emphatic assurance by Congressman Mott, who described himself as a "consistent opponent of the death sentence", that the compromise bill "effectively eliminates the so-called 'death sentence'" (79 Cong. Rec. 14168-14170 (1935)).

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necessary for compliance instead of specifying reorganization or dissolution. * * *'' (Italics supplied.)*

In authorizing The United Corporation's transformation into an investment company, subject to such further divestment of the securities of former subsidiaries as it deemed necessary, and with such changes in United's charter and by-laws as it believed to be in the interests of stockholders, the Commission did exactly what Congress intended it should do in such a situation. Moreover, the treatment accorded United was identical with that accorded other companies prior to the decision in the United case

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* Strong confirmation of this view of the statute was furnished by Jerome N. Frank, then Chairman of the Commission, now Judge of the United States Court of Appeals for the Second Circuit, when, on June 6, 1940, he said in pertinent part:

> ''*Still another method of compliance is the conversion of the holding company into an investment trust.* This course can be effected by the abandonment of control by the holding company of its subsidiary operating companies. Under the act, a holding company is a company controlling operating electric or gas utility companies, and a subsidiary company is a company controlled by a holding company. Absent control, the holding company subsidiary relationship ceases to exist. *Thus, it is possible for a holding company to retain all of its present investments merely by making legal arrangements which will effectively deprive it of control.*'' (The Analist, issue of June 6, 1940, page 779.) (Italics supplied.)

Judge Frank's interpretation of Section 11 is in accord with that of Mr. Benjamin V. Cohen, one of the drafters of the proposed legislation, who had stated earlier:

> ''The Holding Company Act requires a severance of *control* over scattered operating properties; it does not require a severance of *investment* in scattered operating properties.
>
> * * *
>
> ''* * * Any holding company, if it desires, can continue to hold its investments, provided it satisfies the SEC that it is not in a position to control or exercise a controlling influence over operating companies.'' (Savings Bank Journal, May, 1940, page 43.) (Italics supplied.)

(*Matter of Utilities Power & Light Corporation*, 5 S. E. C. 483 (1939); *Matter of International Utilities Corporation*, 21 S. E. C. 283 (1945)), and subsequent to that decision *Matter of Electric Bond and Share Company*, —— S. E. C. ——, Holding Company Act Release No. 11675 (1953).

As to the Alternative Contention that United should not be Permitted to Exercise any Control over Nonutility Subsidiaries

Petitioners also argue (citing the President's message to the Congress of March 12, 1935) that, even if dissolution is not mandatory, United should, nevertheless, be prohibited from obtaining control of any non-utility subsidiary (Petition, pp. 69-71). This contention completely overlooks the fact that the scope of the President's message was expressly limited to the public utility field.

In any event, the Investment Company Act of 1940, which was enacted five years after the Holding Company Act, prescribes all of the restrictions upon acquisitions by investment companies which Congress has deemed necessary in the public interest. See, for example, Sections 12(d)(1) and (2) (15 U. S. C. §§ 80 a-12(d)(1) and (2)).

POINT II

The decision of the Court of Appeals in this case is supported by the decisions of this Court; the petitioners' claim of conflict is without foundation.

Petitioners have seized upon a footnote in this Court's opinion in *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90 (1946), to the effect that the "great-grandfather clause" did not happen to be there involved, as support for their claim that the Court's decision in that case is not controlling here. The footnote in question was not intended to limit the Court's opinion,

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as its summary of the legislative history of the Act shows. The Court, in the main body of the opinion, said, in this respect (329 U. S. at 115):

> "Thus the compromise bill which became law omitted the unconditional provision of § 11(b)(3) for the elimination of all holding companies within five years, *substituting therefor the 'great-grandfather clause' of § 11(b)(2), and gave the Commission discretion to determine the necessary steps for compliance instead of specifying reorganization or dissolution.* There is nothing to indicate that the framers of the compromise bill meant to forbid reorganization or dissolution as remedies which the Commission might choose. Indeed, the fact that these two remedies had been previously specified is strong evidence that they were in the minds of those who wrote the portion of § 11(b)(2) now under consideration and that those persons merely wished not to restrict the Commission to those two remedies; *they thus gave the Commission discretion to choose whatever remedy it felt necessary.* This legislative history, when combined with the various references to dissolution in other parts of § 11, compels the conclusion that dissolution is one of the remedies contemplated by § 11(b)(2) and that its choice falls within the allowable area of the Commission's discretion." (Italics supplied.)

Having *expressly* adverted to the "great-grandfather clause", the Court *immediately thereafter stated* that the Commission has "discretion to determine the necessary steps for compliance instead of specifying reorganization or dissolution." It thus made no distinction between "great-grandfather" companies and other companies.*

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* Petitioners also fail in their attempt to explain away this Court's decision in the *Otis* case (323 U. S. 612). No amount of argument can change the crucial facts that in the *Otis* case, as in the *American Power & Light* case, the Court (a) did not suggest in any way that dissolution of every "great-grandfather" company is requisite under the Act, and (b) did state unequivocally (323 U. S. at pp. 637-638) that the Commission may direct remedies other than dissolution.

The statement (Petition, p. 34) that the Commission took the position in the *American Power & Light* case that dissolution is a statutory command, is untrue. The Commission's brief before this Court in the *American Power & Light* case (pp. 102, 133-134) stressed the point that the existing dissolution order could be modified in the event of a change of circumstances which might render feasible the continued existence of the company. What is more, this Court expressly referred to this possibility, stating (329 U. S. at p. 121):

> "* * * In the meantime, nothing precludes American or Electric from seeking revocation of the dissolution orders on a showing that the conditions upon which the orders are predicated do not exist, thereby making some other type of order more appropriate. * * *"

The Decision of The Court of Appeals is not in Conflict with Decisions in other Circuits

There is not the slightest intimation in any of the four opinions claimed to be in conflict with the Court of Appeals' decision herein (Petition, pp. 40-43), that dissolution is mandatory for every "great-grandfather" holding company. As shown by the following discussion, the cases cited by petitioners strongly support the decision in the present case.

1. ***Protective Committee For Class A Stockholders of International Hydro-Electric System, et al. v. Securities and Exchange Commission,* 184 F. (2d) 646 (2d Cir. 1950).**

The Commission Order under review in that case denied an application to modify a dissolution order, which had been outstanding for seven years, upon the grounds that the conditions upon which that order had been based, no longer existed. In affirming the Commission's order, the Court devoted a substantial portion of its opinion to the question as to whether, by directing dissolution under the

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circumstances there present, the Commission had abused its discretionary powers. The Court's careful consideration of this point emphatically negatives the claim that the Commission must *ipso facto* require dissolution of every "great-grandfather" company. Recently, a new proposal to convert International Hydro-Electric System into a closed-end non-diversified investment company was filed with the Commission and hearings on the proposal are to begin on August 11, 1953. (See *Matter of International Hydro-Electric System,* Holding Company Act Release No. 12052.)

2. *City National Bank & Trust Co. of Chicago* v. *Securities and Exchange Commission, et al.*, 134 F. (2d) 65 (7th Cir. 1943).

In that case, the Court decided only that the retirement by a holding company of certain debentures during the course of its dissolution was not a purely voluntary act of the company, but resulted from the impact of the Holding Company Act; and, that, accordingly, debenture holders were not entitled to a premium. Moreover, the Commission's liquidation order, which necessitated retirement of the debentures, not only was not contested by the company (described as one "which existed in a dormant condition, with business activities of such a meager nature as to require the services of only one paid officer and one employee" (*id.* at p. 68)), but was entered *subsequent* to the commencement of voluntary liquidation proceedings by the management, whose directors had "decided there was no economic justification for the continued existence of the company. * * *" (*id.* at p. 67)

3. *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475 (6th Cir. 1943).

Here, again, the management did not challenge the Commission's dissolution order, but, indeed, intervened in the review proceeding, brought on by a stockholder, "for the purpose of supporting the order of dissolution."

The Court gave express recognition to the availability under Section 11(b)(2) of alternative methods for compliance, stating (*id.* at p. 479) that "§ *11(b) (2) vests the Commission with wide discretion as to steps to be taken to insure the attainment of the statutory ends.* * * *" (Italics supplied.)

4. *New York Trust Co., et al.* v. *Securities and Exchange Commission, et al.*, 131 F. (2d) 274 (2d Cir. 1942).

The issue in that case was, again, whether debenture holders were entitled to a premium upon the retirement of the debentures pursuant to a plan of dissolution. In answer to the suggestion that an alternative treatment for the debentures would have been "to require the holding company to be left at the top of the system to assume them" (which alternative was necessarily based upon the premise that the holding company would continue in existence), the Court stated (*id.* at p. 275):

> "* * * We need not, however, discuss the virtues or the opposite of that suggestion. Obviously Congress gave the Commission the power, subject to the review provided for its orders, to decide what was necessary *in each instance* to effectuate the provisions of subsection (b). * * *" (Italics supplied.)

The recent Decision of the United States District Court in the *Electric Bond and Share Company* case

Petitioners' cryptic reference to the recent decision of the United States District Court for the Southern District of New York in the *Electric Bond and Share Company* case (footnote, p. 15 of Petition) is misleading as to the scope of the decision. Moreover, the decision has been changed since petitioners' brief was filed. In that case (*Matter of Electric Bond and Share Company*, —— S. E. C. ——, Holding Company Act Release No. 11675 (1953)), the

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Commission approved a plan filed by a registered holding company for compliance with the Act, the essence of which was that the holding company would reduce its ownership in its domestic utility subsidiary to the 4.9 per cent level, and thereafter transform itself into a registered investment company. One of the secondary facets of the plan was a proposal that, pending completion of the program for divestment of its subsidiary's stock, the company be permitted to make investments outside the restricted fields available under the Commission's general rules under the Act.

When the plan was taken to the District Court for enforcement (*Matter of Electric Bond and Share Company*, Civil Action No. 8349), the Court (McGohey, D. J.) questioned only the *interim* investment program. The Court in its first decision expressly refrained from passing on any part of the Commission's order except that dealing with the *interim* investment program. Moreover, this difficulty was readily overcome by an immediate remand to the Commission and an approval by it of amendments, which provided that Electric Bond and Share would take all legal steps necessary to qualify itself for exemption from the Act, and that during the interim period not more than two-thirds of its available funds would be invested in assets other than cash, cash items and securities having a regularly quoted market.

As amended, the United States District Court approved the plan and on July 17, 1953, issued an order of enforcement. The Court at no time questioned the propriety or validity of a plan to continue the company as an investment company. By its final order of enforcement, it has expressly approved that form of compliance with Section 11.

The Commission's Decisions in other Cases Support its action in this Case

Petitioners deal at length with the Commission's decision in the *Commonwealth & Southern Corporation* case (11 S. E. C. 369 (1942)), and stress the fact that, at one point in its analysis of its own powers under Section 30, the Commission stated that the Act, as finally passed by Congress, contains "no general program" for the transformation of holding companies into investment trusts. Clearly, what the Commission intended to convey by this statement was that the program under the Act would necessarily be less extensive than the one contemplated by S. 2796, which had proposed that *every* holding company terminate its holding company relationship. Any doubt on this point is resolved by reference to the footnote which immediately followed this observation of the Commission, and which states (11 S. E. C. p. 378):

> "This is not to say that the final enactment prohibited such mergers, consolidations or transformation. * * *"

Petitioners have also attempted to minimize the importance of the Commission's decisions in two cases determined prior to *The United Corporation* case, in which the Commission permitted holding companies to transform themselves into investment companies (Petition, pp. 26, 53). However, the fact is that Ogden Corporation, the company involved in the first case (*Matter of Utilities Power & Light Corporation,* 5 S. E. C. 483 (1939)) continues to be a registered investment company (see Form N-30B-1 quarterly report of Ogden Corporation to the Securities and Exchange Commission dated April 7, 1953 (S. E. C. File No. 811-550)); and, that General Water Gas & Electric Company, the corporation which was permited to transform in the second case (*International Utilities Corporation, et al.,* 21 S. E. C. 283 (1945)) operated actively as an investment company until November, 1946, when, for reasons wholly

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unrelated to any requirement under the Holding Company Act, it was dissolved by the voluntary act of its stockholders.

POINT III

The Commission's approval of United's plan in this case did not constitute an abuse of discretion.

Except for reckless charges of "influence", the petitioners have made no attempt to support the claim that the Commission's approval of United's plan in this case was an abuse of discretion.

Insofar as deemed necessary, we already have answered the charges of "influence." (See pages 10-14, ante.) Petitioners themselves have for ten years accepted and acted under the Order they claim was obtained through influence. All of their claims in this respect have been found by a Congressional Committee to be without the support of credible evidence and have been repeatedly rejected by the courts. The finding of the Congressional Committee was made after petitioner Phillips had testified before the Committee and after it had heard the full and complete testimony of Judge Burns.

The Court of Appeals had similar charges before it and dismissed them as insubstantial.

The petitioners are silent about their own proposals that United continue as an investment company and the careful consideration given to them by the Commission (R. 31-34).

The record before the Commission in the present case clearly establishes that the issues tendered both by the petitioners themselves and by the Company were, as this

Court stated in the *American Power & Light Company* case, "within the allowable area of the Commission's discretion."

The Court of Appeals, reviewing the record, concluded as follows (R. 190):

> "* * * The Commission simply did not agree with the conclusions drawn from the evidence by the petitioners. Contrary to petitioners' contention, there is evidence in the record to support the Commission in exercising its discretion to permit United to survive."

This Court has repeatedly held that any charge of abuse of discretion by a responsible administrative agency must be supported by the clearest and most convincing kind of evidence. (See *Securities & Exchange Commission* v. *Chenery Corporation, et al.*, 332 U. S. 194, 208 (1947); *Meadows* v. *United States*, 281 U. S. 264, 271 (1930))

CONCLUSION

The petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

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Dated: July 24, 1953.

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